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Is it now time for a single Europe-wide fining policy? An analysis of the fining policies of the Commission and the Member States

I Introduction

As soon as any company becomes involved in a cartel case, the first question that its management is likely to ask its lawyer is what fine will the Commission impose. This ought to be a question that a well-informed lawyer should be equipped to answer – after all a criminal lawyer will generally be able to inform his or her client what sentence to expect if found guilty of a particular crime. But the reality is that even the best-informed lawyer would struggle to give any more than an approximate range, which could turn out to be half or double the fine ultimately imposed.

This article examines the reasons why it is so difficult to predict the size of fines for cartel infringements. It examines why this lack of transparency and predictability is so important for a decentralized system of competition law. Leniency will not be analysed, as much has been written about it elsewhere and as there are ongoing attempts to harmonise leniency policy across Europe, whereas no such attempt appears to be being made when it comes to setting the level of fines.

II An Analysis of the failings in Commission fining policy

The Old (Pre-1998) Rules

Prior to 1998, the only conditions that applied to the setting of fines were those set out in Regulation 17, namely that fines could not exceed 10% of the undertaking's total worldwide turnover[1] and that: "In fixing the amount of the fine, regard shall be had both to the gravity

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[1] Regulation 17 was not explicit that the relevant turnover was the total worldwide turnover of the guilty undertaking, but this was made clear by the Court, for example in Joined Cases 100-103/80 *Musique Diffusion Française* ('*Pioneer*') [1983] ECR 1825, ¶ 119.

and to the duration of the infringement."[2] Clearly, such minimalist rules gave the Commission a wide discretion when setting fines.

The Commission's practice was not consistent under Regulation 17. It changed its fining policy when imposing fines in individual cases, as the following quote from the *Pioneer* judgment makes clear:

> "The Commission admits that the present cases are the first in which it has imposed a level of fines considerably higher than in the past. Before the adoption of the contested Decision it had not imposed fines exceeding 2% of the total turnover of the undertaking, even for serious infringements. In these cases the fines range from 2 to 4% of turnover."[3]

Moreover, the Commission did not systematically give any reasoning for setting fines at the level it did in each case. There were general references to factors that were taken into consideration, but no indication of the link between these factors and the size of the fine on each company. Nor was there any concrete indication as to why the fines varied as between the different companies.

For example, in the *Polypropylene* case,[4] the fines imposed on 15 companies ranged from ECU 500,000 to ECU 11,000,000, yet the Commission's reasons for setting the fines are short, with the decision simply setting out a series of factors that were taken into account,[5] and never giving any concrete explanation as to why each company was fined at the level it was.[6] A similar level of detail can be found in other multi-party cases, such as *Cement*.[7]

This approach gives rise to two fundamental concerns. First, how can it ensure equality of treatment and fairness as between different companies in the same case? Second, how can it guarantee coherence and fairness as between one case and another?

In practice, the Commission did appear to generally apply a tariff of sorts when assessing the fines to be imposed on individual companies (this was certainly the well-informed belief of the Brussels legal market). A company participating in a serious price fixing cartel could expect to be fined up to 10% of its EEA turnover in the market that was the subject of the cartel. This tariff was never publicly announced, but it has been mentioned in some court

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[2] Article 15(2) of Regulation 17.

[3] *Pioneer* ¶ 103.

[4] *Polypropylene* [1986] OJ L230/1.

[5] Polypropylene, ¶ 108 records that the following factors that were taken into account: (i) collusion on pricing and market sharing are very serious restrictions on competition; (ii) the size of the polypropylene market; (iii) the participating undertakings accounted for almost the whole of this market; (iv) the collusion was institutionalized in a system of regular cartel meetings which set out to regulate and organize the market for polypropylene; (v) the meetings were held in secret; (vi) (in mitigation) the undertakings incurred substantial losses on their polypropylene operations over a considerable period, price initiatives generally did not achieve their objective in full and there were no measures of constraint to ensure compliance.

[6] *Polypropylene* ¶ 109: "In assessing the fines to be imposed on individual undertakings the Commission has taken into consideration the role played by each in the collusive arrangements, the length of time they participated in the infringement, their respective deliveries of polypropylene to the Community and their individual total turnover."

[7] *Cement* [1994] OJ L343/1. In that case, fines were imposed on 42 different parties, but while there is some explanation of the factors influencing the Commission's approach, there is no concrete explanation linking the amount of the fine on each party to its conduct.

cases.[8] Of course, there was no guarantee that the Commission would abide by its never-announced practice and no basis for challenging its failure to do so in any given case.

Overall, it is clear that the pre-1998 approach to fining policy was unsatisfactory. There was little transparency; relatively little reasoning; and no means to guarantee fairness and equality of treatment between different cases and between different companies in the same case.

The 1998 Fining Guidelines

When the Commission's 1998 Guidelines on the setting of fines[9] ("the Guidelines") were introduced, one of their principal aims was to provide greater transparency in the setting of fines. Indeed, the first paragraph of the Guidelines reads as follows:

> "The principles outlined here should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, whilst upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalizing infringements of the competition rules."

Below, there follows an analysis of how the guidelines have been applied in practice over the past six years, which shows how difficult it remains to predict fines. This is a significant issue for companies, which in this era of large fines are pressed by shareholders and the stock market to estimate the likely liability.

The conclusion is that if the Guidelines are judged against the goals set out above then they fail the test. Transparency and coherence remain elusive, in particular as between one cartel case and another. In practice there is no way to accurately predict the size of the fine in advance of receiving the Commission's decision in any case. But this should not be altogether surprising as it appears to be Commission policy.

Unpredictability – one element underlying the Commission's current approach

It appears to be Commission policy not to make it possible for a company to forecast the level of a fine with any degree of accuracy. This is based on the idea that an infringer should not be able to balance the level of profit from the infringement as against the level of the fine and the chances of getting caught:

> "If deterrence is to be effective, it cannot be possible for an undertaking to be able to rely on fines being set at a particular level and thus to conclude that, having regard to the likelihood of detection, the benefits of anti-competitive conduct outweigh the risk of a fine."[10]

The same sentiments regarding the need for unpredictability in fining amount can be found in the writings of Commission officials:

> « Les entreprises visées auront toujours beau jeu de reprocher à la Commission une prévisibilité insuffisante. Il faut à cet égard insister sur deux choses. En premier lieu,

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[8] See, for example, Case T-223/00 *Kyowa Hakko v Commission* [2003] ECR 000, ¶¶ 26, 46-51, where Kyowa's arguments were based not just on the shared knowledge of the Brussels legal market but on correspondence and meetings with Commission staff in which this practice was explained.

[9] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, [1998] OJ C 9.

[10] The Commission's explanation of its policy to the Court of First Instance in one of the appeals brought against its *lysine* decision, one of the first appeals against a fine that was imposed under the Guidelines.

chaque affaire présente par définition des spécificités propres. En outre la politique d'amendes est, comme son nom l'indique, une «politique» qui ne peut s'appliquer mécaniquement. Il est donc légitime que la Commission dispose à cet égard d'une marge significative de discrétion. En second lieu, pour être efficace une politique de dissuasion doit se garder d'opérer une «tarification» excessivement détaillée des infractions: un certain degré d'«imprévisibilité» permet d'empêcher les entreprises de céder à la tentation du simple bilan «coût/bénéfices» d'une infraction à la loi. » [11]

It is submitted that such a policy of delberate unpredictability would quite simply be wrong. There is no evidence that unpredictability has been successful to date in preventing repeat offenders or of preventing the same offence from being committed by different companies in similar industrial sectors. It is submitted that a much more effective way of ensuring deterrence would be to make the likely fine very clear to the companies concerned, while having the level of the fine at a sufficiently high level to make anyone conducting a cost/benefit analysis think twice before entering a cartel.[12]

The maximum fine in the US for infringements under sections 1 or 2 of the Sherman Act is $100 million or twice the total gain to the conspirators or twice the total loss to the victims, whichever is the greater.[13] When individual criminal penalties, aggressive enforcement, an effective leniency programme and the US plaintiff bar are added into the mix, deterrence is clear. Unpredictability plays no part in the success of the American approach to cartel enforcement.

So why does the Commission (or certain of its officials at least) say it needs a degree of unpredictability? The Commission is not reticent when it comes to imposing very large fines. Europe increasingly has criminal sanctions. The Commission has essentially adopted the key elements of the US leniency programme. It is taking active steps to increase private civil actions. Finally, there are extra staff inside DG Competition who are being devoted to cartel cases following the end of the notification system. It is submitted that the current arrangements in Europe are more than adequate to ensure a comparable level of deterrence to the US; unpredictability need – and, in this author's opinion, should – play no part in European fining policy.

The need for the Courts to insist on integrity and coherence in Commission decisions

The Commission's approach has been supported to some extent by the European Courts, which in older cases accepted the ability of the Commission to raise the level of fines on policy grounds without actually announcing the change in policy.

"the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation no 17 if that is necessary to ensure the implementation of

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[11] « La politique de la Commission en matière d'amendes antitrust: récents développements, perspectives d'avenir », François ARBAULT, Commission Competition Policy Newsletter Summer 2003 at p 6. The author notes that the article is based on an intervention by Deputy Director General Rocca during a conference.

[12] The author is sceptical that any companies have in fact carried out a cost benefit analysis. If any cost-benefit analysis was carried out, it is unlikely to have been done at corporate (main board) level – the infringers are not likely to have asked the main board whether it thought the conduct would be profitable or not given the potential fines. And even if cost-benefit analyses were carried out in the past, it is highly unlikely that any such analysis would be carried out now given the potential criminal penalties. What more sure fire way of showing dishonesty (the test for individual criminal liability in the UK) than carrying out a cost/benefit analysis to decide whether to enter into a cartel?

[13] See http://www.usdoj.gov/atr/foia/divisionmanual/ch2.htm

Community competition policy. On the contrary, the proper application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy." [14]

While the Courts have in a number of cases said that the Commission is subject to a duty to be coherent and respect the integrity of its previous decisions,[15] and while they have sought to ensure coherency in the fines imposed in a single cartel case,[16] they have yet to enforce this principle systematically in fining cases in the same way as the Court of Appeal would do when considering sentencing in a criminal case.

It is submitted that this should be the next stage in judicial review of fines. Fines in the tens or hundreds of millions of euros are a serious punishment even for the largest of companies. When punishments of such scale are being handed out there can be increasingly little doubt that the fines involve a quasi-criminal element of punishment, particularly when the executive concerned may now also face prison time for their actions.[17] Criminal judges in criminal courts across the EU are constrained not only by rules and guidance laid down by legislators, but more importantly by the need to maintain a coherent and fair system of sentencing which treats – and is seen to treat[18] – each criminal fairly and in an equal manner.[19] It is submitted that a rigorously enforced principle of coherence at EU level is one of the key elements needed to support a more predictable fining policy both at Commission and Member State level.

The Commission's post-1998 approach to setting the fine in competition cases

The method currently used by the Commission to calculate the fine based on its Guidelines contains five steps, which come in the following order.

Starting point for gravity

The Commission starts by determining a basic amount of the fine for gravity. The Guidelines provide for three categories of infringement:[20] very serious infringements, such

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[14] Joined Cases 100-103/80 *Musique Diffusion Française v Commission* [1983] ECR 1825, ("*Pioneer*"), at para 109.

[15] See, for example, Case T-227/99 *Kvaerner Warnow v Commission* [2002] ECR II-1205.

[16] See, for example, Joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission* [2004] ECR 00000, at paragraphs 228–235 (in relation to Tokai Carbon).

[17] See, for example *Société Stenuit v France* A 232 - A (1992) Com. Rep, EHRR [1992] 13 509, where it was held that a French Ministerial decision to impose a fine on an undertaking for alleged anti-competitive behaviour in relation to a cartel amounted to a determination of a criminal charge within the sense of Article 6(1) of ECHR.

[18] "Justice must not only be done, but must be seen to be done" per Lord Chief Justice Hewart in *R v Sussex Justices ex p McCarthy* (1926).

[19] This is the reason why, for example, the English Court of Appeal regularly adopts sentencing guidelines explaining the appropriate punishment for particular categories of cases.

[20] Guidelines, Section I.A: "Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.

- Minor infringements: These might be trade restrictions, usually of a vertical nature, but with a limited market impact and affecting only a substantial but relatively limited part of the Community market. Likely fines: ECU 1 000 to ECU 1 million

- Serious infringements: These will more often than not be horizontal or vertical restrictions of the same type as above, but more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market. They might also be abuses of a dominant position (refusals to supply, discrimination, exclusion, loyalty discounts made by dominant firms in order to shut competitors out of the market, etc.). Likely fines: ECU 1 million to ECU 20 million.

as price fixing, should have a basic amount for gravity (which, presumably, includes deterrence) of at least €20m, with lesser, but still serious offences having a starting amount of at least €1m. Minor offences are punished by still lower fines, including token fines.[21] As noted in more detail below, the amount for gravity has varied considerably from case to case.

Deterrence

An increase for deterrence may be applied to some companies as a second step. This possibility is nowhere mentioned in the Guidelines, so the only guidance as to the rationale behind the Commission's policy comes from a few terse sentences in a handful of cases. The Commission has only ever applied multipliers for deterrence, meaning that a starting amount of €Xm would be multiplied by a factor of Y to give €XYm. The calculation of the fine would then proceed from that point. As noted below, the Commission's reasons for imposing a multiplier for deterrence are not consistent; but the impact on a company can be huge: a multiplier of 3 trebles the size of the fine.

Duration

The third stage is to apply an increase for the duration of the infringement to €XYm. This is predictable and almost always involves a mechanical increase of 10% per year for the entire duration of the infringement. Despite the potential unfairness inherent in too rigid an approach (as to which see below), the Commission has applied less than 10% per year only in a very few cases.[22]

Aggravation/Mitigation

Increases for aggravating factors and decreases for mitigating factors are then added to the basic amount increased for deterrence and duration. These are generally relatively predictable. For example, being the ringleader in a horizontal cartel typically leads to an increase of 25%-35%.[23] Continuing the infringement after the Commission commenced its

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- Very serious infringements: These will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardize the proper functioning of the single market, such as the partitioning of national markets and clear cut abuses of a dominant position by undertakings holding a virtual monopoly … Likely fines: above ECU 20 million "

[21] See the Commission's decision on the ticketing arrangements for the *1998 Football World Cup* in which the Commission imposed a symbolic fine of €1,000, [2000] OJ L5/55.

[22] In *Volkswagen* [1998] OJ L 124/60, ¶ 217, the Commission imposed a 5% for the parts of the infringement during which the infringement was of a lesser intensity (1988-1992), while imposing 10% for those years when the infringement was intensified (1993-1997). In *Lysine*, [2001] OJ L152/24, ¶ 365, Sewon was a party to the infringement for 5 years, which justified a 40% increase for duration. However, the Commission took account of the fact that it played a passive role in the infringement during 1995 and awarded a 20% reduction in the increase for duration. Sewon was therefore awarded a 32% increase for duration. In *Pre-insulated Pipes*, [1999] OJ L24/1, ¶170, ABB received a 40% increase for duration when member of the infringement for 5 years, due to the fact that the cartel was in abeyance for part of the time. In *JCB*, [2002] OJ L 69/1, ¶ 253, JCB received a 55% increase for 11 years on the basis that the various different infringements (by which JCB prevented parallel trade) only ran for part of that time. In *Nathan/Bricolux*, [2001] OJ L 54/1, ¶ 132, Nathan received an increase of 20% for duration for agreements, which restricted parallel trade, and which ran from 1993 to 1998, because there was evidence only that the agreements were implemented and enforced as from 1995.

[23] Henss/Isoplus received a 30% increase for being a ringleader and misleading the Commission in *Pre-Insulated Pipes*, ¶ 179. Minoan Lines received a 25% increase for having been a ringleader in *Greek Ferries*, [1999] OJ L 109/24, ¶ 159. ADM and Ajinomoto received 50% increases for being the ringleaders in *Lysine*, ¶¶ 329-356. In *Citric Acid*, [2002] OJ L 239/18, ¶¶ 255-273, ADM and Hoffman-La Roche received a 35% increase for being the ringleaders.

investigation typically would lead to a 10%-20% increase.[24] However, there is a degree of inconsistency between the different cases, with companies being penalised more than in some cases than in others for the same aggravating factor.[25]

Leniency

Finally, the appropriate reduction under the Leniency notice (if any) is applied to the amount calculated under the previous four steps. This was fairly predictable under the old leniency notice. It should be more so under the Commission's new leniency programme that was introduced in 2002[26] to give companies that cooperate greater legal certainty.

Full immunity is available to the first company to submit evidence enabling the Commission to carry out an investigation or to find an infringement of Article 81 (provided that the Commission did not already have sufficient evidence).[27] Other companies can still receive a reduction in the fine if they provide the Commission with evidence of the suspected infringement that represents significant added value with respect to the evidence already in the Commission's possession and they terminate their involvement in the infringement no later than at the time they submit the evidence.[28] The first company to meet these conditions receives a discount of between 30-50%; the second, a discount of between 20-30%; all other subsequent undertakings will receive up to a 20% reduction.[29]

The Commission's policy is that leniency applicants should have some degree of certainty as to the level of reduction they will receive, but not as to the absolute level of the fine.[30] This approach has been supported by the European Courts.[31]

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[24] *Volkswagen* [1998] OJ L124/60, ¶221, received a 20% increase for having continued after the Commission had given it a warning, and for having put economic pressure on dealers. Tarco, Ecu, Ke-Kelit and Sigma received a 20% increase in the *Pre-Insulated Pipe* case for having continued after the investigation started (¶ 179). Tokai Carbon, Nippon Carbon and SEC received a 10% increase in *Graphite Electrodes* for having continued after the intervention of the Commission, [2002] OJ L100/1, ¶¶ 209-210.

[25] For example, compare the 50% increase ADM received for being one of the two ringleaders in *Lysine*, with the 35% increase it received for being one of the two ringleaders in *Citric Acid*.

[26] Commission Notice on immunity from fines and reduction of fines in cartel cases, [2002] OJ C45/3, ("Leniency Notice").

[27] Leniency Notice ¶ 8. The company wishing full immunity must satisfy the following conditions:[27] it must provide the Commission with all available evidence, cooperate fully throughout the procedure, end its involvement in the cartel no later than the time it contacts the Commission, and must not have coerced others into participating in the infringement (id., ¶ 11). The Commission will write a letter granting the company conditional immunity when the information is provided. This conditional immunity may subsequently be withdrawn if it transpires that the conditions are not met. If the company satisfies all the conditions at the end of the administrative procedure it will be granted immunity from fines in the decision (id., ¶19).

[28] Id., ¶ 21.

[29] *Id.*, ¶ 23. Within these bands, the Commission takes account of the time the evidence was provided and the extent to which the evidence provides added value. There is no requirement that the company provide all evidence in its possession.

[30] The Commission's expressed its policy as follows when responding to an appeal against the size of a fine: "Thus an infringing company certainly has the right to know what better treatment it may expect for co-operating, and that is the purpose of the Leniency notice. But neither a co-operating nor an uncooperative undertaking is entitled to entertain any confident expectation as to the amount of the basic fine or the calculation method to be used in arriving at it."

[31] Case T-220/00 *Cheil Jedang v Commission* [2003] ECJ 000, ¶¶ 38-42, especially ¶ 40: "given that the purpose of the Leniency Notice is, as stated in Section A.3 thereof, to [set] out the conditions under which enterprises cooperating with the Commission during its investigation into a cartel may

Looking at the five stages as a whole

The Commission's fining practice is relatively predictable in increases for duration, aggravating and mitigating factors and leniency. The problem of predictability arises when the Commission sets the starting point and when it applies a multiplier for deterrence. These steps leave a great deal of discretion in the hands of the Commission and lead to fines being unpredictable, both in absolute and relative terms. These points are explained in further detail below.

Starting Point and Deterrence – where the Guidelines fail the test of transparency and coherence

Starting point

In the section dealing with Gravity, the Guidelines say that the "Likely fine" for very serious infringements is "above ECU 20 million." Given the way the Guidelines are drafted, with there being separate sections on duration, aggravation and mitigation and leniency, "Likely fine" should presumably read as "starting point" or "starting point plus multiplier" (albeit that the concept of a multiplier is nowhere mentioned in the Guidelines).

The basic amount for gravity has varied considerably from case to case. The Commission sometimes divides the guilty companies into two or more different groups, setting one basic amount for each group. The basis for so doing and for setting the level of the basic amount has varied, and the Commission has never fully explained its rationale. Factors that have been used by the Commission[32] include: group turnover (worldwide,[33] but presumably EEA turnover can also be relevant), turnover in the product concerned (worldwide[34] or EEA[35]),

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be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them, the only legitimate expectation which the applicant was entitled to entertain was one relating to the conditions under which a reduction would be allowed in recognition of its cooperation, not to the amount of the fine which would otherwise have been imposed upon [it] or to the calculation method that might be used to that end."

[32] Judging by what is actually written in the decision.

[33] *Lysine* ¶ 304: "In order to take account of the effective capacity of the undertakings concerned to cause significant damage to the lysine market in the EEA and the need to ensure that the amount of the fine has a sufficiently deterrent effect, the Commission considers it appropriate that larger basic fines should be imposed on Ajinomoto and ADM than on Kyowa, Cheil and Sewon because of the considerable disparity between their sizes. It has therefore divided the parties into two groups according to size and taken this into account in determining the starting point for the fine according to the gravity of the infringements. The comparison is made on the basis of total turnover in the last year of the infringement. It is appropriate to take worldwide turnover as the basis for the comparison of the relative size of the undertakings because it enables the Commission to assess the real resources and importance of the undertakings concerned in the markets affected by their illegal behaviour."

[34] *Lysine*, ¶ 308. *Vitamins* [2003] OJ L6/1, ¶ 681: "The Commission considers it appropriate to appraise the relative importance of an undertaking in each of the vitamin product markets concerned on the basis of their respective worldwide product turnover. This is supported by the fact that each cartel was global in nature, the object of each was, inter alia, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market."

[35] *Carbonless Paper* [2004] OJ L115/1, ¶ 407: "As the basis for the comparison of the relative importance of an undertaking in the market concerned, the Commission considers it appropriate to take in the present case the EEA-wide product turnover. This approach is supported by the fact that this is an EEA-wide cartel, the principal object of which was *inter alia* to agree concerted price increases throughout the EEA."

market share (national,[36] worldwide[37] or EEA[38]), and total market size (worldwide[39] or EEA[40]). This leads to a very unpredictable outcome.

But even when it explains what factors have been taken into account, the Commission only does so in the most general of terms. It gives no reasoning as to why the starting amount of the fine is set at the precise level that it was. Sometimes the Commission in fact applies a very precise method of calculating the starting amount (e.g. the starting amount of Microsoft's fine was set down to a fraction of a euro) but the decision never says why.[41] In other cases, the Commission has chosen a round number as the starting point, but did not explain why that precise amount was chosen.[42] Different companies are sometimes lumped together in groups, despite there being differences within each group as to the size and culpability of the companies forming that group, yet the Commission's reasoning for grouping different parties together is often vague or sketchy.[43] Finally, in one case, the

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[36] For example, *Luxembourg Beer* [2002] OJ L253/1, ¶ 95, *British Sugar* [1999] OJ L76/1, ¶ 193 (where the market was the UK excluding Northern Ireland) and *Industrial and Medical Gasses* [2003] OJ L84/1, ¶ 430 (turnover in the Netherlands).

[37] *Graphite Electrodes* ¶ 149 and *Citric Acid* ¶ 237 (basing the separation of the participants on market share).

[38] *Nintendo* [2003] OJ L255/33, ¶ 386: "the considerable disparity in the size of the undertakings participating in the infringement justifies differential treatment. For this purpose, undertakings concerned can in principle be divided into three groups established according to the relative importance of each firm with regard to Nintendo Corporation Ltd/Nintendo of Europe GmbH as a distributor of the products (and those products only) in the EEA measured on the basis of each Party's share in the total volume of Nintendo game consoles and cartridges purchased for distribution in the EEA." EEA market shares were used to separate the infringers into 5 groups in *Carbonless Paper* ¶ 408. (Obviously, EEA market shares and EEA turnover in the relevant market are equivalent when separating companies into groups.)

[39] *Food Flavour Enhancers* [2004] OJ L75/1, ¶¶242-243, see below. The total market size being taken into account was the worldwide market as the Commission subsequently distinguished the different parties based on their worldwide turnover in the product concerned, ¶ 247.

[40] *Zinc Phosphate* [2003] OJ L153/1, ¶¶ 302-303, see below. The total market size being taken into account was the EEA market as the Commission subsequently distinguished the different parties based on their EEA turnover in the product concerned, ¶ 307.

[41] The starting point ends in a 1, yet when this figure is doubled for deterrence, the result is a figure ending in 3. This indicates that the starting point was set to a fraction of a euro. See *Microsoft* not yet published, ¶¶ 1075-1076.

[42] See, for example, *Lysine* ¶¶ 304-305, where the Commission accordingly set the basic amount for Ajinomoto and ADM at €30m and for Kyowa, Cheil and Sewon at €15m. But it never explained how these fines fitted in with the two parameters on which the fines were set, namely global turnover and global lysine turnover.

[43] For example, In *Citric Acid*, H&R had a worldwide market share of 22%; ADM and J were next; then came HLR with 9%; while C was the smallest with 2.5%. These companies were placed into 3 groups on the basis of their relative importance in the market concerned. H&R's starting point was €35m; ADM, HLR and J received a starting point of €21m; and C started at €3.5m. Why did H&R start at €35m and HLR at €21m, when the former had 2½ times the latter's market share? The ratio of fines between C and H&R does respect the ratio of their relative shares, but this is not the case for C and the other 3 players. Similarly, in *British Sugar*, the Commission mentions market share in its calculation of starting amount. British Sugar's market share was 51-54% (for granulated sugar as a whole); and the starting amount of its fine was €18m. In contrast, Tate & Lyle's market share was 38-40%; yet its starting amount was a mere €10m. This is inconsistent: Tate & Lyle received roughly half the starting amount that British Sugar did, even though Tate & Lyle's market share was only about 10-15% lower. It is difficult to escape the conclusion that the starting point of the fine is set somewhat arbitrarily, and without precise regard to any scientific criteria.

Commission took distribution market shares and based the starting point on these in an indirect sense.[44]

A further – but linked – issue is the difference between what the Commission says in Court in response to an appeal and what it says in its decision. Microsoft is one example where a precise explanation of the method of calculating the starting amount has been given to the Court, but is not set out in the decision. In another court case in which the author has been involved, the Legal Service gave a hint as to the real practice being followed by the Commission,[45] which is never set out in fining decisions.

In addition, there are contradictions in the decisions themselves, for example in *Zinc Phosphate* where the Commission says opposite things about the method of calculating the starting amount of a fine in consecutive sentences.[46] That decision also indicates a further failing of the policy set out in the Guidelines of starting at €20m for very serious infringements – this was clearly harsh on infringements in very small markets. The Commission's formal position was that it not obliged to reduce the size of the starting amount even for small markets. However, in practice it did change its approach and imposed modest starting amounts in such markets.[47]

What does this mean in practice for companies and their advisers? Quite simply that no company can predict what sort of starting point it is likely to face and on what basis the calculation will be made.

Deterrence

The imposition of a multiplier for deterrence is again unpredictable and seems to lack any coherent underlying rationale. The unpredictability is not helped by the fact that the concept of a multiplier for deterrence is nowhere to be found in the Guidelines.

The first case (*Pre-insulated pipes*) saw ABB having its starting amount multiplied by 2.5 due to its strategic involvement in running the cartel and to its overall size. This seemed like a specific deterrent because of the behaviour of ABB. Indeed, the decision expressly states that the reason for a multiplier was to stop ABB repeating its behaviour.[48]

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[44] *Nintendo*, ¶ 386: "In this case, the considerable disparity in the size of the undertakings participating in the infringement justifies differential treatment. For this purpose, undertakings concerned can in principle be divided into three groups established according to the relative importance of each firm with regard to Nintendo Corporation Ltd/Nintendo of Europe GmbH as a distributor of the products (and those products only) in the EEA measured on the basis of each Party's share in the total volume of Nintendo game consoles and cartridges purchased for distribution in the EEA in the year 1997, the last year of the existence of the infringement." But there is no direct correspondence between the starting point and the market share.

[45] "In cartel cases, the Commission habitually takes account of the overall value of the market affected in order to determine the starting amount for the first group."

[46] In *Zinc Phosphate*, [2003] OJ L153/1, when setting the starting point, the Commission reasoned as follows (¶¶ 302-303): "It is not the practice of the Commission to consider the size of the product market as a relevant factor to assess gravity. Nevertheless, without prejudice to the very serious nature of an infringement, the Commission will in this case take into consideration the limited size of the product market." The identical language was used in *Food Flavour Enhancers*, [2004] OJ L75/1, ¶¶ 242-243. In both cases, the Commission stated a clear principle, which it departed from in the very next sentence. Unpredictability clearly remains a Commission objective.

[47] In *Zinc Phosphate* the Commission imposed starting points of €3m and €0.75m and in *Food Flavour Enhancers* starting amounts of €6m and €2.4m were imposed.

[48] *Pre-insulated pipes*, ¶ 168, where the Commission noted that: "In determining the penalty to be imposed on ABB, the Commission will take account of its economic capacity to cause significant

Subsequent cases saw companies' fines increased by multipliers of (generally) between 1 and 3 due to the size of the corporate group.[49] It is not altogether clear whether the multiplier was based on the size of the undertaking compared to other participants in the cartel or whether it was based on the size of the undertaking compared to the market that was the subject of the cartel. The highest known multiplier to date was in *Belgium Brewers*, where Interbrew was subject to a multiplier of 5.[50] Yet there has not always been consistency – some companies have not had any multiplier imposed despite their large size.[51]

The Commission took a new turn in *Nintendo*, where a relatively small company[52] received a multiplier of 3 because of its size and status as a manufacturer (as opposed to a reseller, for example). This was the first ever multiplier in a vertical infringement.

Microsoft saw its fine doubled on the basis of the cash reserves that it had in the bank, the company's market capitalization and its profitability.[53] Yet this was the first time a multiplier had been imposed in a dominance case and the first case where a multiplier was imposed in an infringement only involving one company. In previous cases, there were always a number of companies involved in the infringement, only some of whom received a multiplier.

So the Commission's practice gives rise to the following questions regarding consistency of approach:

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damage to competition and the need to set the fine at a level which ensures by its deterrent effect that there is no repetition" (emphasis added).

[49] ADM's fine was subject to a multiplier of 2 in the *Citric Acid* cartel on account of the overall size of the company (turnover €13.9bn); Hoffmann-La-Roche's fine was subject to a multiplier of 2 in the *Citric Acid* cartel on account of the overall size of the company (turnover €18.4bn); Haarmann & Reimer's fine was subject to a multiplier of 2½) in the *Citric Acid* cartel because it was controlled by Bayer, which is a large company (turnover €30.8bn); Brasserie de Luxembourg's fine was subject to a multiplier of 3 in the *Luxembourg Beer* cartel because it belonged to Interbrew, the largest beer company in the world (1999 turnover €3.2bn, 2000 turnover €5.6bn, the next biggest Luxembourg brewer was under €50m), and therefore had sufficient resources to know what it was doing was wrong (although no fine was actually imposed as it received 100% leniency); Showa Denko KK's fine was subject to a multiplier of 2½ in the *Graphite Electrodes* Cartel on account of the overall size of the company (turnover €7.5bn); VAW Aluminium's fine was subject to a multiplier of 1.25 in the *Graphite Electrodes* Cartel on account of the overall size of the company (turnover €3.7bn).

[50] *Belgian brewers* [2003] OJ L200/1, ¶ 344: "To allow for their respective sizes and general resources, the Commission considers that the amount of the fines calculated in recital 342 should in Interbrew's case be multiplied by a factor of 5 … . This results in a fine of €1,250,000 for Interbrew." The multiplier only applied to the private label cartel, which was of limited scope and duration, so the impact of the multiplier was modest in absolute terms.

[51] For example, ADM received no multiplier in the *Lysine* case, but did receive a multiplier in the *Citric Acid* case. Its turnover far exceeded €10bn in both instances.

[52] Nintendo's worldwide turnover was approximately €4.2bn, lower than almost all the companies listed in the footnote above.

[53] *Microsoft*, ¶ 1076: "Given Microsoft's significant economic capacity,[1342] in order to ensure a sufficient deterrent effect on Microsoft, the initial amount should be adjusted upwards by a factor of 2…" Footnote 1342 explains: "Microsoft is currently the largest company in the world by market capitalisation. … Microsoft's resources and profits are also significant. Microsoft's [latest SEC filing] reveals that it possessed a cash (and short-term investment) reserve of $49,048 million … [T]his SEC filing indicates that … Microsoft earned profits of $13,217 million on revenues of $32,187 million (profit margin of 41%). For the Windows PC client PC operating system product … Microsoft earned profits of $8,400 million on revenues of $10,394 million (profit margin of 81%)."

- Is deterrence based on subjective elements: preventing the particular company from doing it again? This was the approach set out in the Pre-insulated pipes case, the first where a multiplier was imposed.
- Or is it about objective deterrence - bigger companies are supposed to know the rules better? This somewhat questionable proposition (at least when all the companies involved are multinationals) has been advanced in a number of cases. But is this really appropriate if the infringement is committed by a remote branch of a big multinational, which does not necessarily have any more resources than a smaller company?
- Should a multiplier be imposed only when more than one company is involved to separate the big from the small in a multi-party case?
- On what basis should a multiplier be imposed in a case where there is a single infringer, whose turnover is mainly in markets whose size has already been taken into account in the setting of the basic amount?
- Are multipliers just for cartel cases? When should they also be applied in dominance cases?
- What relevance should be given to other factors (status as a manufacturer, amount of cash reserves or profit margins)?

The major problem for any lawyer advising a client is the absence of any guidance as to what are the underlying principles when considering a multiplier for deterrence. It is submitted that this is because there are no consistent underlying principles.

The automatic increase for duration raises different issues

The quasi-automatic 10% increase in the fine for each year of the infringement raises two different issues.

First, it can be too inflexible and not take sufficient regard of the intensity of the infringement. Generally, the same annual increase is applied regardless of the intensity of the infringement during that year. This can have considerable unfairness: the parties are punished the same whether they have one meeting in a year with minimal impact or 15 meetings with significant impact on prices. An increase could even be applied for a year in which the participants did not even meet – although the infringement was found to be continuing by virtue of the fact that there were meetings in previous and following years.

Second, the current system over-penalises infringements that are of short duration and under-penalises long-term infringements. Why should a 10-year infringement incur only double[54] the fine of an infringement lasting a year? If the cartel remains of uniform intensity one would expect that a 10-year infringement would be ten times as harmful for consumers. If successful, the cartel ought to make ten times as much money for the participants.

On the other hand, at least the policy is clear and transparent, if perhaps in need of some reform. It leads to predictable results and could be applied on a consistent basis across the EU following decentralization.

Conclusions about Commission fining policy

Predictability of the overall outcome in a Commission decision imposing fines is low. There are two reasons for this – absence of any guidance as to how the starting amount is set and why a multiplier for deterrence is imposed. It is submitted – for deterrence at least – that the

[54] 10% increase for 10 years is equivalent to doubling the fine.

reason for the absence of any guidance is the fundamental absence of a theoretical underpinning for the Commission's approach.

III Do the Member States do it better?

Do the fining policies applied in the Member States pass the test of transparency and coherence in a way the Commission's approach does not? Or are the same criticisms valid? To answer this question, a survey of Member States' fining policies has been carried out, based on publicly available material. The survey – which is annexed to the end of the paper – examines the Member States' approach to imposing fines and analyses in particular the approach they take to setting the starting point of the infringement; whether they provide for increases for deterrence and whether they increase the fine for duration. Aggravating and mitigating factors are not covered (there is little case law in many Member States so such an anlysis could not be comprehensive).

The survey shows that there is a significant degree of disparity between the Member States both on the approach they apply to imposing fines and as regards the procedures and institutions by which fines are imposed.

The majority of Member States follow the Commission's approach to fining in its broadest sense – fines imposed at up to 10% of worldwide turnover, with the amount of the fine taking account of the severity and duration of the infringement.

However, most of the Member States that do so follow the approach laid down in Regulation 17, with a wide discretion being given to the competition authority (and in a number of instances the national court) when setting the fine.[55] The applicable national laws give only very general guidance as to the principles that are to be applied.

Since their fining policies are essentially based on Regulation 17 without any fining guidelines, the majority of Member States suffer from the same problems as Commission fining policy prior to the 1998 Guidelines. Moreover, given the relatively low number of fining decisions that these Member States have ever adopted, there is an even greater issue of predictability than affected the Commission pre-1998, as at least it had a significant body of prior decisions that could (in theory) act as some form of a guide. In this respect, the fining policies of the majority of Member States are less predictable and transparent than the Commission's current policies.

Of course, the situation in a number of those Member States is improved by the fact that the competition authority does not itself impose the fine, but rather acts as a prosecutor before a national court, the latter having the power to impose fines.[56] But while the fact of having an impartial judge imposing the fines does avoid the problems involved with having the same officials acting as prosecutor and judge, it does not immediately guarantee predictability. It is only once a sufficient body of precedent builds up, supported by appellate decisions, that a judge-based system gains a similar level of predictability as well-drafted guidelines.

There are however a few Member States that follow the Commission's model and also have fining guidelines. While some of the countries (e.g. Belgium) have simply adopted the Commission's Guidelines almost word for word, others have taken the opportunity to improve on the Commission's approach and cure some of its failings.

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[55] Member States that essentially follow the Commission's pre-1998 approach include: Slovakia, Portugal, Luxembourg, Austria, Lithuania, Italy, Malta, Hungary, Cyprus, Czech Republic, Poland, Finland, Sweden, France.

[56] For example, Austria, Sweden and Finland follow the Commission's pre-1998 rules, but the fines are imposed by judges, not by officials. Other countries where judges set the fines include Denmark, Spain and Ireland.

The approach of the UK deserves note as being a distinct improvement over Commission policy when it comes to transparency in setting the amount for gravity. The OFT starts with the turnover in the relevant market (the one that is the subject of the infringement) and can impose a starting point of up to 10% of that turnover.[57] This starting point can then be multiplied by the number of years of the infringement to take full account of the anti-competitive effect of the infringement over its full duration.[58] However, the OFT's description of circumstances when an additional penalty may be imposed for deterrence is distinctly vague, and not particularly conducive to generating transparency or predictability.[59] Thereafter there is an adjustment for mitigation and aggravating factors.[60] Finally there is an adjustment to ensure the fine does not exceed 10% of total turnover, as well as a potential reduction to ensure that a company that has been fined for similar conduct elsewhere in the EEA is not subject to double punishment.[61]

The Netherlands also have their own scheme for fining those who infringe competition laws. The basic tariff of the fines are set based on percentages of the companies' turnover in the products concerned over the entire duration of the infringement ('concerned turnover'). In this way, the Netherlands takes account of the fact that a company will profit twice as much from an infringement that lasts two years than one lasting a single year and sets the basic amount and duration in one single step. The NMa's guidelines provide for different ranges of penalty depending whether the infringement is a less serious one (up to 10% of concerned turnover), a serious one (up to 20%) or a very serious one (up to 30%). [62]

Latvia also has its own, very recent fining guidelines, which follow the Dutch approach of having tariffs based on a percentage of the worldwide turnover fo the undertaking, with the percentage varying according to the seriousness of the infringement. It adopts a different approach to duration from the Netherlands, providing for a small percentage increase in the tariffs for longer-running infringements. [63]

Finally, there are a few countries that take a completely different approach to that of the Commission. Germany is one of them – basing its fines on the amount of additional proceeds gained by virtue of the infringement.[64] This leads to its own problems. In particular, appeals are almost inevitable when large fines are imposed, as those who

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[57] See the OFT's guidelines as to the appropriate amount of a penalty at ¶¶ 2.3-2.8, at: http://www.oft.gov.uk/NR/rdonlyres/4546166B-0413-45E4-8C8F-208CC3CDC325/0/OFT423.pdf

[58] OFT's guidelines, ¶ 2.9.

[59] "The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives outlined in paragraph 1.4 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anticompetitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibition. Considerations at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement and the special characteristics, including the size and financial position of the undertaking in question. Where relevant, the OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration." (OFT's Guidelines, ¶ 2.11).

[60] OFT's guidelines, ¶¶ 2.14-2.16.

[61] OFT's guidelines, ¶¶ 2.17-2.20.

[62] See the Guidelines for the Setting of Fines, Stcrt. 248 of 21 December 2001 http://www.nmanet.nl/nl/Images/11_3860.pdf (not available in English), summarised in the Annex.

[63] Not available in English. See Annex below for a summary.

[64] It has been suggested by officials from the Bundeskartellamt that Germany may also move to a system where the maximum is 10% of worldwide turnover.

receive a fine contest (often successfully) the finding that they made additional proceeds at all or in as large an amount as determined by the Bundeskartellamt.[65]

Estonia has taken a radically different direction when it comes to competition enforcement. It does not provide for any administrative fines for cartel infringements, but rather prefers to deter cartels by way of criminal sanctions. On the other end of the spectrum, Slovenia has a relatively weak system of punishment with maximum fines of €375,000.

The overall picture among the Member States is that – with some notable exceptions – there is less transparency and predictability in their approaches to imposing fines than under the Commission's post-1998 approach. The potential for disparities in treatment as between the Member States is just as great as between the Commission and any Member State.

IV Coherence does matter in a decentralised system of competition law

It is submitted that there is a pressing need for a coherent fining policy for infringements of EC competition law now that enforcement of EC competition law is decentralised.

The major changes following decentralisation of competition enforcement

One of the major changes brought about by decentralisation is the concept of case allocation between the Commission and the National Competition Authorities (NCAs). Allocation of cases amongst the Commission and NCAs generally will take place only at the beginning of an investigation. The governing principle is whether the NCA or the Commission is "well placed" to investigate the infringement and bring it to an end. [66]

In most cases, the NCA that receives the complaint or starts an *ex-officio* proceeding will remain in charge of the case. However, re-allocation of a case is considered at the outset of proceedings[67] where either the NCA is not well placed to act or where other NCAs consider themselves to be well-placed to act in the case. The aim is for NCAs to re- allocate the case to the well-placed enforcement authority.[68] There is no mechanism for resolving a divergence of views on the allocation of the case, although the Commission could take over such a case.[69] When cases are re-allocated, the case files are also transferred. The NCA

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[65] The Düsseldorf Court of Appeals recently annulled an imposition of fines based on additional proceeds because the FCO had failed to prove that there had been any. Be*rliner Transportbeton I*, decision of 6 May 2004, Wirtschaft und Wettbewerb DE-R 1315.

[66] Under the Commission Notice on cooperation within the Network of Competition Authorities (the 'NCA Notice'), 2004 OJ C 101/43, an NCA may be considered to be well placed to deal with a case if the following cumulative conditions are fulfilled: (i) an agreement or practice has substantial direct actual or foreseeable effects on competition within its territory and is implemented within it or originates from its territory, (ii) it is able to effectively bring to an end the entire infringement, and (iii) it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement. (¶ 8) In sum, there must be a clear nexus between the infringement and the territory of a Member State.

[67] When an allocation issue arises, it should be resolved promptly, normally within two months. (NCA Notice ¶¶ 16-19.)

[68] NCA Notice ¶¶ 6-7. The Commission will be particularly well placed if the arrangements effect competition in more than three Member States, if a Commission decision is needed to develop EC competition policy or to ensure effective enforcement, or if a case is closely linked to other Community provisions for which the Commission has exclusive competence. (NCA Notice ¶¶ 14-15.)

[69] The Commission has the power to take over a national case after the initial two-month allocation period by initiating proceedings under Article 11 (6) of Regulation 1/2003. This will only happen in certain limited circumstances. These include situations when (i) network members envisage conflicting decisions in the same case, (ii) network members envisage decision which is obviously in conflict with consolidated case law, (iii) network member(s) is (are) unduly drawing out

Notice provides for the exchange and use of data, including confidential information both between the NCAs and the Commission and amongst the NCAs. [70]

What does all this mean taken together? In short, there is now a significant chance that a company that was subject to dawn raid or an investigation in a particular country could end up being fined by the authorities of another country or by the Commission. That is why decentralization raises a number of questions of principle in relation to fining policy.

The Coordination Mechanisms Do Not Cover Fining Policy

The modernisation of competition law involves three elements to ensure the system runs smoothly. Aside from the case allocation system and the mechanism for mutual cooperation during the course of an investigation, the third element is a system whereby the Commission (and, by convention, all the other NCAs) are sent a copy of a decision by a NCA 30 days before its adoption so the Commission can check that the decision conforms to the consensus interpretation of EC law. The Commission can give its comments during this period and, in the worst case, assume jurisdiction over the case pursuant to Article 11(6) of Regulation 1.

The aim of this third mechanism is to ensure a uniform application of Community law. However, this system only discusses the legal theories that the NCA proposes to apply. It does not discuss the fine that is to be imposed. So there is no coordination mechanism to ensure equal treatment and consistent fining policy.

In addition, even if the coordination mechanism were extended to cover fining policy, it still would not ensure consistency. Consensus can be reached through discussion when – as with the substantive law under Articles 81 and 82 – there is a body of established case law and decisions following well-established principles which applies throughout the EU. In contrast, there is no unified fining policy for infringements of Articles 81 and 82. The Commission's guidelines on fining policy only limit the Commission's discretion. NCAs are not even formally bound by the limit of 10% of worldwide turnover established by Regulation 17 and now enacted as Article 23(2) of Regulation 1/2003, albeit that a similar limit does appear in most national laws.

Moreover, as seen above, the Commission's practice is not predictable. Even if an NCA wanted to adopt the exact same fine as the Commission would have in a particular case, it would have no way of predicting the exact fine that the Commission would have imposed. If Brussels lawyers with many years of experience cannot predict the level of fines their client is to receive, an NCA cannot be expected to do any better.

This means that modernisation is likely to lead to wide disparities in the punishment applied –punishment is likely to vary depending on geography.

Coherence and equality before the law

It is a fundamental principle that like cases should be judged alike. Equality before the law is a fundamental principle of the rule of law, on which the Community is founded.[71] If the

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proceedings, (iv) there is a need to adopt a Commission decision to develop competition policy, in particular when a similar competition issue arises in several Member States, or to ensure effective enforcement, or (v) the NCA(s) concerned do not object.

[70] The information exchanged should only be used in evidence for the purposes of applying Articles 81 and 82 and in respect of the subject matter for which it was collected by the transmitting authority. (NCA Notice ¶¶ 26-28.)

[71] See Article 20 of the Charter of Fundamental Rights: "Everyone is equal before the law". This would have become Article II-20 of the Constitution.

same substantive law is being applied it should not matter which court is applying it – the outcome should be the same.

In the national court system one would not expect a judge in Manchester to impose a greatly stricter sentence in a criminal case than a judge in London.[72] Both have the same sentencing guidance and both have access to precedents applied in previous cases. Similarly in a federal system such as the US, one would not expect a Federal District Judge in Florida to impose a higher fine than the Federal District Judge in the District of Colombia. And even if something did go wrong in an individual case, there would always be the possibility of an appeal to a higher court – the Court of Appeal in the England or the Circuit Court of Appeals or the US Supreme Court – to ensure that justice was served out uniformly.

Both these mechanisms to ensure equality before the law are absent in the decentralised system of competition law. As seen above, the applicable fining policy differs considerably as between the Commission and the Member States and as between the Member States. Moreover, there is no possibility of an appeal to a higher court at European level, which would maintain consistency. This means that differential treatment is institutionalised in the current system of fining policy. It is submitted that the system therefore needs to be reformed.

Is the decision to re-allocate a case a legally challengeable act?

Suppose a case were re-allocated from Belgium to Germany or from the UK to the Commission. The Commission's stated policy is that a case re-allocation is not a legally challengeable act.[73] But is that a tenable position?

It is submitted that a decision to allocate a case is an attackable act as the company that is subject of the investigation could as a result face a significantly higher level of punishment. The difference in likely fine is not just a question of the authorities exercising their discretion differently. It is due to the applicability of different legal rules in the different jurisdictions. For example, there are no fines for companies in Estonia, so a company whose case is transferred from Estonia to the Commission is guaranteed to be subject to greater punishment. A decision to deport an alleged criminal to another jurisdiction certainly changes his status legally and certainly is appealable.

The European Courts' caselaw says that only acts that bring about a change in a party's legal status are attackable as a matter of EC law.[74] Thus, preliminary acts such as statements of objection are not attackable acts.[75] However, being subject to a different legal

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[72] That is why the English Court of Appeal issues sentencing guidelines.

[73] NCA Notice, ¶ 31: "Given the fact that the Council Regulation has created a system of parallel competences, the allocation of cases between members of the network constitutes a mere division of labour where some authorities abstain from acting. The allocation of cases therefore does not create individual rights for the companies involved in or affected by an infringement to have the case dealt with by a particular authority."

[74] The decision to re-allocate a case would be attackable under EC law as it is a decision taken pursuant to Regulation 1/2003. If the case were to be allocated by a Commission decision (i.e. reallocated from Commission to national level or national level to the Commission), then the CFI would probably be the place where the decision would be challengeable, hence the focus on the European Court's rules on admissibility. A re-allocation between NCAs might have to be challenged in a national court, but similar arguments could be used to satisfy national law standing requirements.

[75] Case 60/81 *IBM v Commission* [1981] ECR 2639 at ¶21: "It follows from the foregoing that neither the initiation of a procedure nor a statement of objections may be considered, on the basis of their nature and the legal effects they produce, as being Decisions within the meaning of Article 173 of

regime is a change in legal position and it is an attackable act – thus an opening notice in a state aid case where the aid is alleged to be illegal aid (i.e. aid that was not notified before being granted) is a challengeable act because the classification of the measure as new aid, even if provisional, adopted by the Commission in its decision to initiate the procedure under Article 88(2) EC, has independent legal effects.[76] Similarly, a decision to subject a cartel investigation to Commission penalties rather than German or Estonian penalties does have independent legal effects and would in this author's submission be an attackable act.

The first legal challenge to case re-allocation could have the effect of bring the decentralised system to a grinding halt. This is a further reason why there is a need for reform of fining policy.

V A proposed solution to the problem

There is only one solution that cures the problems outlined above and ensures both common guidelines and a common court of final instance as the ultimate guarantor of consistency of approach in the new world of decentralised enforcement. In plain terms, a pan-European fining policy applicable whenever the Commission or an NCA applies Articles 81 and 82 and imposes fines, subject to the final interpretation and control of the European Court of Justice.

The concerns advanced above would be cured if the Commission and Member States jointly agree clear and transparent guidelines on the fines that will be imposed for infringements of Articles 81 and 82. This would also have the benefit of clarifying the Commission's current practice, which remains opaque and unpredictable. This would ensure that punishment does not depend on geography and that there is equal punishment for the same offence throughout Europe.

What would these common standards look like? Here are some tentative ideas as to the content of these common guidelines.

An EU code on fining policy

The unified code would need to be sufficiently flexible as to cope with infringements covering a different geographic area. It would need to be sufficiently clear as to be applicable in a consistent manner by all 25 NCAs (and even, potentially, by regional competition authorities such as those in Germany and Spain). But it would also need to be sufficiently severe as to act as a deterrent against would-be cartelists.

The following suggestion follows the structure of the Commission's current guidelines and draws on the better elements from them and from national fining guidelines, while aiming to be more predictable overall.

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the EEC Treaty which may be challenged in an action for a declaration that they are void. In the context of the administrative procedure as laid down by Regulations no 17 and no 99/63, they are procedural measures adopted preparatory to the decision which represents their culmination."

[76] Case C-400/99 *Italy v Commission* (Tirrenia), [2001] ECR I-7303 at ¶¶ 57-62: "Such a decision … necessarily alters the legal position of the measure under consideration and that of the undertakings which are its beneficiaries … after its adoption there is at the very least a significant element of doubt as to the legality of that measure which … must lead the Member State to suspend payment, since the initiation of the procedure under Article 88(2) EC excludes the possibility of an immediate decision holding the measure compatible with the common market which would enable it to be lawfully pursued. Such a decision might also be invoked before a national court called upon to draw all the consequences arising from the infringement of the last sentence of Article 88(3) EC."

The suggested unified code would have four stages: setting of the basic tariff (including duration); applying an increase to take account of the conglomerate nature of infringers; taking account of aggravating and mitigating factors and leniency. The maximum of 10% of worldwide turnover would be retained as the upper limit (since it currently figures in most Member State fining polices as well as that of the Commission).

Basic tariff - turnover of the infringer should be the key element

The key element in the proposed code would be the guilty party's turnover for the product that is the subject of the infringement in the applicable geographic area.[77] The relevant geographic area will normally be the EEA when the Commission intervenes; it will be smaller in cases handled by national competition authorities as they will generally handle cases involving up to 3 Member States. The advantage of using the turnover in the relevant market is that this is a known variable. It also ensures that any appeal concerning fining policy would essentially be reduced to legal questions about market definition that the courts are well equipped to handle.

The relevant turnover would never be for a wider geographic area than the EEA – even if the market is worldwide. Worldwide turnover in the product concerned should play no part in the analysis – this will be taken into account by other non-EEA jurisdictions when setting their fine. Systematic use of worldwide turnover in the product concerned favours EEA-based producers that have greater turnover in the EEA and unduly punishes foreign producers.

The basic tariff would be a set percentage of this turnover over the duration of the infringement.[78] Thus, there would be no separate test for duration. The aim here would be to ensure that the infringer's punishment was proportional to any benefit made because of the infringement over its entire duration. This would be considerably more severe than the Commission's current practice of 10% increase per year, although the fact that the basic tariff could be set at a more moderate level could compensate for this.

A different percentage range would be set for each category of infringement.[79] Thus for example a hard-core price fixing cartel could have a range of (say) 2 to 5% or 5% to 10%. The Commission and NCAs would have discretion within that range, with only the worst cartels receiving the highest level in the range. The Commission and NCAs would probably only be subject to limited judicial review when fixing the exact level of the fine within this range. A lower percentage range would be set for less serious infringements. Minor infringements might continue to be subject to token fines. There would need to be set criteria for each category of infringement.

In order to preserve some degree of flexibility, and to ensure that justice is done in each individual case, there would be a general power for the NCAs and the Commission to impose a lower basic tariff if this is reasonable in all the circumstances. Legal certainty would always apply as regards the maximum likely fine, but clemency would remain possible.[80]

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[77] Based on the UK approach, see Annex.

[78] The approach in the Netherlands, see Annex.

[79] This would be a more detailed version of the approach currently in force in the Netherlands and Latvia.

[80] In particular, clemency would be appropriate when the cartel was sporadic and did not meet for significant periods or if the cartel was ineffective. (An example of the latter category might be a where meetings took place with the aim of increasing prices, but the prices in fact fell.)

Conglomerate size

The Commission's current practice on applying multipliers for deterrence is confused, with multipliers being utilised for a number of different reasons. The proposed code would apply an increase to the basic tariff for one reason only – the overall size of the corporate group. The basis for this is that large corporate groups would be expected to undertake the relevant training to ensure that all arms of their organisation obey competition law, even those remote branches active in very small markets and which are low on the radar screen of corporate HQ.

The basis for the increase would be a comparison of the turnover of the overall corporate group with its turnover in the relevant market in which the infringement took place. The increase would be based solely on an objective test. Any individual (subjective) reasons why the fine should be increased would be taken account under aggravating factors. As noted above, worldwide turnover in the product concerned should play no part in the analysis.

One way of achieving this would be to calculate the increase for conglomerate power on the basis of a Conglomerate Ratio, which would be defined as = (total turnover – turnover in relevant market)/total turnover. This could work as follows:

Ratio	Increase (%)
0	0
1	5
2	10
10	50
100	500

The 5% increase is given as an indication. It may be too harsh or too lenient in practice. The exact variables that would be used are a matter of political and economic rather than legal judgment. It may be that once there is an effective system of criminal punishment of guilty individuals in Europe, then there would be less need to impose special responsibilities on larger corporate groups.

Aggravating and mitigating factors

The Commission's policy on aggravating and mitigating factors has been relatively consistent. All that would be needed would be to codify the various different factors and give a range of percentages associated with an aggravating or mitigating factor. Thus, for example, continuing the offence after the Commission has intervened typically draws a 10-20% increase, and this could form the range for a new fining code.

The list of aggravating and mitigating factors could be expanded to take full account of practices in the Member States (which have not been surveyed in detail in this paper). One additional item that springs to mind – drawing on aspect of the current German system[81] – would be to include as an aggravating factor the fact that the undertaking had made excessive profits (above a certain pre-defined level) as a result of the cartel.

[81] And the systems of a number of other Member States, see Annex.

Leniency

The issue of ensuring that there is a coherent one-stop-shop leniency policy across the EU is one that is already being addressed by the Commission and the NCAs.[82] The Commission's current leniency policy is clear and transparent and could be applied Community-wide – provided a suitable clearing system is in place to ensure that all NCAs are informed of leniency applications being made across Europe.

The appeal mechanism (both direct actions and preliminary references)

Since the EU code on fining policy would be established under EC law, the appeal mechanism would either be by a direct action to the Court of First Instance against a Commission decision (with possible appeal to the European Court of Justice) or by a preliminary reference to the European Court of Justice, following the appropriate national procedure. The fact of having the same court as ultimate guardian of the system would ensure coherence.

There should be many fewer appeals under the new system than the old system as the Commission's discretion would be exercised within relatively narrow limits and companies and their advisers would know what to expect in advance. It is notable that the introduction of the Guidelines in 1998 was not accompanied by a reduction in the number of appeals. Indeed, the number of appeals increased dramatically. This testifies to their lack of transparency and predictability (as well as the increased severity of the fines).

VI Conclusion

The above analysis has highlighted the significant shortcomings in the Commission's recent approach to fining companies that it has found to have infringed EC competition law. The Commission's approach lacks coherence, does not guarantee equality of treatment between one case and another and, when it comes to the multiplier for detterrence, lacks any consistent underlying principle.

The analysis has also shown that the Member States have a very diverse approach to fining policy, with a majority following the Commission's pre-1998 approach. With a few notable exceptions, such as the UK and the Netherlands, the Member States' approach to fining policy ensures a less transparent and predictable outcome than the approach taken by the Commission today.

These divergences and the absence of predictability across most of the EU become very important in a system of decentralised enforcement of EC competition law, where cases are reallocated between NCAs. It is a fundamental principle of law that punishment should not vary depending on geography; yet this is exactly what is happening under the present decentralised system of competition law.

A single harmonised, transparent and coherent fining policy is necessary to legitimise the decentralised enforcement of EC competition law. This should be implemented without delay.

[82] See

http://europa.eu.int/comm/competition/antitrust/legislation/authorities_with_leniency_programme.pdf

Annex – Summary of the Fining Policies in the Member States

Authority/Member State	Summary of method of setting the fine	Approach to Basic Tariff	Approach to Deterrence	Approach to duration	Maximum
Bundeskartellamt, Germany	Differs from commission model. No sentencing guidelines. ARC s81(2) provides for fines of up to €500,000 plus up to three times the additional proceeds.[83] Fines always based on additional proceeds. Appeals generally over such additional proceeds exist. The Courts have recently raised the requirements for proving additional proceeds.[84]	Not Applicable.	Link via reliance on additional proceeds made.	Taken account of in additional proceeds.	Three times the additional proceeds.
Office of Fair Trading, UK	Modified version of post-1998 Commission model, with sentencing guidelines.[85] Involves setting starting point, then adjustment for duration, possible increase for deterrence, taking account of aggravating/mitigating factors; and finally an adjustment to ensure that the maximum fine is not exceeded and to prevent double jeopardy. [86]	Up to 10% of relevant turnover (turnover in relevant product and geographic markets).[87]	No fixed policy- discretionary increase for deterrence (both subject and objective considerations).[88]	Basic amount can be multiplied by number of years of infringement.[89]	10% of section 36(8) turnover i.e. worldwide turnover[90]

[83] Act Against Restraints of Competition, section 81(2): "The administrative offence may be punished … by a fine of up to □500,000, and in excess of this amount up to three times the additional proceeds obtained as a result of the violation, in all other cases by a fine of up to □25,000. The amount of the additional proceeds may be estimated." http://www.bundeskartellamt.de/wDeutsch/download/pdf/02_GWB_e.PDF

[84] The Düsseldorf Court of Appeals annulled an imposition of fines based on additional proceeds because the FCO had failed to prove that there had been any. *Berliner Transportbeton I*, decision of 6 May 2004, Wirtschaft und Wettbewerb DE-R 1315.

[85] Competition Act 1998, section 36.

Conseil de la Concurrence, France	France follows a pre-1998 Commission model, with fines being proportionate to the gravity of the offence, to the importance of the damage to the economy, to the situation of the enterprise or of the group to which it belongs, and to the whether the undertaking is a repeat offender.[91] No published fining guidelines.	No clear guidance.	Repeat offences can be punished more heavily, otherwise no guidance.	No clear guidance.	€3m or 10% of turnover.

[86] OFT's Guidance as to the Appropriate Amount of a Penalty (December 2004) - http://www.oft.gov.uk/NR/rdonlyres/4546166B-0413-45E4-8C8F-208CC3CDC325/0/OFT423.pdf

[87] Id., §2.7: "The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year. "

[88] Id., §2.11: "The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives outlined in paragraph 1.4 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anticompetitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibition. Considerations at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement and the special characteristics, including the size and financial position of the undertaking in question. Where relevant, the OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration."

[89] Id., §2.10: "The starting point may be increased or, in exceptional circumstances, decreased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement. "

[90] See the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000 No. 309), (as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259)), section 3: "The turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it." http://www.legislation.hmso.gov.uk/si/si2000/20000309.htm and http://www.legislation.hmso.gov.uk/si/si2004/20041259.htm

[91] Code de Commerce, L464-2 : « Les sanctions pécuniaires sont proportionnées à la gravité des faits reprochés, à l'importance du dommage causé à l'économie, à la situation de l'organisme ou de l'entreprise sanctionné ou du groupe auquel l'entreprise appartient et à l'éventuelle réitération de pratiques prohibées par le présent titre. Elles sont déterminées individuellement pour chaque entreprise ou organisme sanctionné et de façon motivée pour chaque sanction. Si le contrevenant n'est pas une entreprise, le montant maximum de la sanction est de 3 millions d'euros. Le montant maximum de la sanction est, pour une entreprise, de 10 % du montant du chiffre d'affaires mondial hors taxes le plus élevé réalisé au cours d'un des exercices clos depuis l'exercice précédant celui au cours duquel les pratiques ont été mises en œuvre » http://www.legifrance.gouv.fr/WAspad/VisuArticleCode?commun=&h0=CCOMMERL.rcv&h1=4&h3=14

Konkurrensverket ("KKV"), Sweden	Fines set by Court, not by competition authority. Sweden follows a pre-1998 Commission approach, taking account of gravity, duration and aggravating or mitigating circumstances. No published guidelines. The KKV sues for the imposition of fines, which are imposed by the Stockholm City Court in the first instance and the Market Court in the second (and last) instance. [92]	No clear practice.	No clear practice.	No clear practice.	10% of turnover in the preceding business year.[93]
Kilpailuvirasto (Finnish Competition Authority), Finland	Similar to Sweden: fines are imposed by the market Court upon the proposal of the Finnish Competition Authority.[94] Fines based on gravity, extent and duration of the infringement. No sentencing guidelines, but the government proposal for the Competition Act provides that the fine must exceed the benefit derived from the restriction on competition. This follows from the general principle that breaching the law should never be profitable.[95]	No clear practice.	No clear practice, although there is a general principle that fine must exceed benefit of the infringement ("crime shouldn't pay").	No clear practice.	10% of the guilty enterprise's total turnover.

[92] Swedish Competition Act, 1993, articles 26-28. Article 28 notes the factors to be taken into account: "(1) When a fine is determined, account shall be taken of: 1. the gravity of the infringement, 2. the duration of the infringement, and 3. other aggravating or mitigating circumstances of importance in determining the infringement. (2) In minor cases no fine shall be imposed." http://www.kkv.se/eng/competition/competition_act_fulltext.shtm

[93] Id., section 27(2).

[94] Article 7 of the Finnish Competition Act reads as follows: "(2) In fixing the amount of the fine, regard shall be had to the gravity, extent and duration of the competition restriction. The amount shall not exceed 10 per cent of the total turnover of the business undertaking or an association of business undertakings concerned in the preceding year. (3) The penalty payment shall be imposed by the Market Court upon the proposal of the Finnish Competition Authority. The payment shall be ordered to be paid to the State." http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=act-on-competition-restrictions-amended

Office of Competition and Consumer Protection ('OCCP'), Poland	Fines imposed by the OCCP based on pre-1998 Commission system, taking account of gravity, duration and previous infringements in particular. No fining guidelines.[96]	No clear practice.	No clear practice, but previous infringements are taken into account.	No clear practice.	10% of worldwide turnover.
Conseil de la Concurrence ('CC'), Belgium	Similar to the current Commission system, with fining guidelines (which follow the Commission's Guidelines very closely). [97] Fine imposed by CC based on gravity, duration and illegal gain, modified for aggravating or mitigating circumstances, but also taking account of specific economic circumstances, impact on market, specific circumstances of undertakings involved and their real ability in the particular social context to pay the fine.[98]	Follows Commission's Guidelines save that impact on market and scope of geographic market may be taken into consideration.[99]	No guidance given (like the Commission's Guidelines).	Identical to the Commission system.	10% of total turnover.[100]

[95] The government proposal is a document that is debated in the parliament. It represents the will of the legislator and is commonly referred to in judicial decision-making along with court precedents.

[96] Act on competition and consumer protection, Article 101: " The President of the Office may impose upon the entrepreneur, by way of a decision, a financial penalty being not in excess of ten per cent (10%) of the revenue earned in the accounting year preceding the year within which the penalty is imposed…" and Article 104: "When fixing the amount of the fines referred to in Articles 101-103 the duration, gravity and circumstances of the previous infringement of the provisions of the Act should be particularly taken into account." http://www.uokik.gov.pl/download/Dz_U_03_86_804tjen.doc

[97] See the Belgian fining guidelines at http://mineco.fgov.be/organization_market/competition/lignes_directrices_fr.pdf

[98] Id., at p.2: "Le montant de l'amende sera fixé en fonction de la nature et de la gravité de l'infraction, de la durée de l'infraction et du gain illicite généré par l'infraction. Des majorations pourront compléter le montant de base en raison de l'existence de circonstances aggravantes. Le montant de base pourra également être réduit lorsque certaines circonstances atténuantes existent." and p.6: « Il convient de prendre en considération certaines données objectives telles qu'un contexte économique spécifique, l'avantage économique ou financier éventuellement acquis par les auteurs de l'infraction, l'impact sur le marché, les caractéristiques propres des entreprises en cause ainsi que leur capacité contributive réelle dans un contexte social particulier pour adapter, in fine, les montants d'amende envisagés. »

[99] Id., at p3 : « La gravité de l'infraction est directement déterminée par la loi sur la protection de la concurrence économique qui fixe les limites du montant de l'amende pouvant être prononcée en fonction de la nature de l'infraction commise. L'impact de l'infraction sur le marché lorsqu'il est mesurable et l'étendue du marché géographique concerné pourront également être retenus comme critères supplémentaires pour la détermination du montant de

Competition Protection Office ('CPO'), Slovenia	CPO imposes fines between two set thresholds – roughly €125,000 to €375,000.[101] No fining guidelines, although general law (Misdemeanour Act) provides that seriousness and duration of the violation, the degree of culpability, circumstances in which infringement took place and financial resources of infringer should be taken into account when imposing a fine.	No guidance (save Misdemeanour Act).	No guidance.	No guidance.	Maximum of SIT 90m (€375,000).
Office for the Protection of Economic Competition (the 'Office'), Czech Republic	Pre-1998 Commission system. Office imposes fines based on gravity, duration and possible recurrence.[102] No fining guidelines.	No guidance.	No guidance – although possible recurrence is taken into account.	No guidance.	10% of net turnover.

l'amende. », p.4: "Il conviendra de tenir compte du poids spécifique, et donc de l'impact réel, du comportement infractionnel de chaque entreprise sur la concurrence, notamment lorsqu'il existe une disparité considérable dans la dimension des entreprises auteurs d'une infraction de même nature. Ainsi le principe d'égalité de sanction pour un même comportement peut conduire, lorsque les circonstances l'exigent, à l'application de montants différenciés pour les entreprises concernées sans que cette différenciation n'obéisse à un calcul arithmétique."

[100] See the Belgian Act on the Protection of economic Competition coordinated on 1 July 1999 at section 36(1) "the Council may impose on each of the undertakings concerned fines not exceeding 10% of their turnover determined in accordance with the criteria laid down in Article 46" and section 46(1): "The turnover referred to in Articles 5 and 36 shall be the aggregate turnover achieved in the previous financial year in the domestic and export markets", http://mineco.fgov.be/redir_new.asp?loc=/organization_market/competition/competition_en_002.htm

[101] Prevention of the Restriction of Competition act, Article 52: "(1) A fine of SIT 30,000,000 to SIT 90,000,000 [€125,000 to €375,000] shall be imposed on a legal entity for committing a violation: if it concludes an agreement on the restriction of competition (Article 5); if it abuses its dominant position on the market (Article 10). " http://www.sigov.si/uvk/util/bin.php?id=2004090613065281

[102] Consolidated Act On The Protection Of Competition, Article 22(2) "(2) The Office may impose on undertakings fines of up to CZK 10,000,000 [€3.3m] or up to 10% of the net turnover achieved in the preceding calendar year where, either intentionally or negligently, they infringed the prohibitions stipulated in Article 3(1), Article 11(1) and Article 18(1), or fail to fulfil commitments accepted pursuant to Article 7(2) or Article 11(3). When deciding on the amount of the fine, the Office shall take into account in particular the gravity, possible recurrence and duration of the infringement of this Act." http://www.compet.cz/English/HS/Zakony/ProtComp2004.doc

Commission for the Protection of Competition ('Commission'), Cyprus	Pre-1998 Commission system. Commission imposes fine based on gravity and duration. No fining guidelines.[103]	No guidance.	No guidance.	No guidance.	10% of combined annual turnover.
Latvian Competition Council ('LCC'), Latvia	LCC imposes fines based on Commission's post-1998 system.[104] Latvia's recently adopted Regulation on setting of fines is akin to Commission's 1998 Guidelines, and follows the general schema of the Guidelines, with a four stage method of calculating the fine taking account of (i) gravity, (ii) duration, (iii) aggravating and mitigating factors and (iv) leniency. The major difference between the Regulation and the Guidelines is that Latvia has a fixed range of percentages for each class of infringement, as well as a different way of calculating increases for duration. The Regulation does not appear to provide for multipliers for deterrence.[105]	Adopts the split between minor, serious and very serious offences. Fines for minor offences are up to 0.5% of undertaking's net turnover in the previous year. Serious offenses between 0.5% and 1.5% of this turnover. Very serious offenses between 1.5% and 7%.	No specific mention of multipliers for deterrence in the Regulation, although being a repeat offender is an aggravating circumstance. To some extent the width of the possible penalties for very serious infringements may obviate the need for specific rules on deterrence.	No increase for duration of less than 1 year. Infringements of between 1 and 5 years lead to an increase of up to 0.5% of the undertaking's net turnover in the prevous year. Infringements of over 5 years, lead to an increase of between 0.5% and 1% of this turnover.	10% of net turnover.

[103] The Protection Of Competition Law Of 1989 (Law 207 of 1989), section 22(3)(c): "Where the Commission … finds an infringement of the provisions of sections 4 and 6 of this Law, it shall have the power to impose a fine of an amount, according to the gravity and duration of the infringement, not exceeding 10% of the combined annual revenue of the enterprise or trade association in the year within which the infringement took place or in the year which immediately preceded the infringement"
http://www.competition.gov.cy/competition/competition.nsf/All/F4BFF0B315A2D8DAC2256C8E003C0C2C/$file/L.%20207-89eng..pdf?OpenElement

[104] Competition Law, section 12: "(1) If the Competition Council determines that there is a violation … in the activities of market participants, it shall take a decision regarding the determination of a violation, legal obligations and imposition of a fine. (2) The Competition Council may impose on market participants fines of up to 5 % of their net turnover for the previous financial year each, but not less than 250 lati each. (3) The Competition Council may impose on competitors [and not "market participants" as the English translation suggests] fines of up to 10 per cent of their net turnover for the previous financial year each, but not less than 500 lati each." http://www.competition.lv/uploaded_files/ENG/E_likumK.pdf

Gazdasági Versenyhivatal ('GVH'), Hungary	Similar to the Commission's pre-1998 policy, with fines being imposed by the GVH based on gravity, duration, benefit gained by infringement, market position of parties and recidivism.[106] No fining guidelines.	Takes account of threat to economic competition and range and extent of harm to consumers.	No guidance. Recidivism is taken into account.	No guidance.	10% of turnover.
Commission for Fair Trading, Malta	Court imposes a fine varying between 1% and 10% of turnover.[107] No fining guidelines.	No guidance.	No guidance.	No guidance.	10% of turnover on the affected market.[108]
AGCM, Italy	Similar to the Commission's pre-1998 approach. Fines imposed by AGCM based on gravity and duration of the infringement.[109]	No guidance.	No guidance.	No guidance.	10% of turnover.

[105] "The Competition Law provides that, when prohibition of agreement and abuse of dominant position is violated, the Competition Council may impose fines on market participants of up to 5 % of their net turnover for the previous financial year each, but not less than 250 lati each. … The Competition Law also authorises the Cabinet of Ministers to issue Regulations which determine the procedures by which fines are calculated. … In the end of 2004 Cabinet Regulation No. 862 "Procedures for Calculation of Fines for Violations referred to in Section 11, Paragraph one and Section 13 of the Competition Law" (i.e. about prohibited agreements between market participants and prohibition of abuse of dominant position) was adopted. This regulation unfortunately is not available in English yet." http://www.competition.lv/?object_id=512&module=news

[106] Hungarian Competition Act, Article 78: "(1) The competition council bringing proceedings may impose a fine on persons violating the provisions of this Act. The maximum fine shall be 10% of the undertaking's net turnover in the preceding business year. … (2) The amount of the fine shall be established with all the relevant facts of the case taken into account, in particular the gravity of the violation, the duration of the unlawful situation, the benefit gained by the infringement, the market positions of the parties violating the law, the imputability of the conduct, the effective co-operation by the undertaking during the proceedings and the repeated display of unlawful conduct. The gravity of the violation shall be established, in particular, on the basis of the threat to economic competition and the range and extent of harm to the interests of consumers." http://www.gvh.hu/index.php?id=575&l=e

[107] Competition Act, section 21(1) "Any person guilty of an offence against articles 16 or 18, shall, on conviction, be liable to a fine (*multa*) from 1 to 10 % of the turnover of the undertaking in the economic interests of whom the person so guilty was acting, so however the fine shall not be less than three thousand liri" http://docs.justice.gov.mt/lom/legislation/english/leg/vol_10/chapt379.pdf

[108] The definitions in section 1 of the Competition Act provide: "'turnover" means the total turnover of an undertaking realized during the preceding financial year on the affected market"; the relevant market may be wider than Malta: "'relevant market" means the market for the product whether within Malta or limited to any particular area or locality within Malta, or outside Malta, and whether or not restricted to a particular period of time or season of the year;"

Danish Competition Authority ('DCA') Denmark	Fines imposed by the Courts after investigation by DCA. Level of fines is Subject to the normal provisions of the penal code, which include considerations of gravity and duration. The turnover for the previous year is also taken into account when setting the fine.[110] Other factors that may be considered include: economic gain, value of goods that were subject of infringement; number and size of participating businesses. Although there are no specific fining guidelines for competition infringements, the travaux préparatoires ('TP') for the Danish legislation do set out various considerations, which are not as such binding on the court.	No specific guidance. The TP anticipate three different categories of fine based on seriousness of the offence, mirroring the Commission system.	No specific guidance.	The TP follow the Commission approach.	No specific maximum.

[109] Competition and Fair Trading Act, section 15(1): "In the most serious cases it may decide, depending on the gravity and the duration of the infringement, to impose a fine up to ten per cent of the turnover of each undertaking or entity during the prior financial year…" http://www.agcm.it/AGCM_ENG/NORMATIV/E_NORMNA.NSF/b50758bf27025fecc125653d00467db4/d6cd09a87f1832b7802564a000533ce6?OpenDocument

[110] Consolidated Competition Act, section 23(3): "Penalty may be imposed on companies etc. (legal persons) pursuant to the provisions of part 5 of the Penal Code. When meting out the penalty under subsections (1) and (2), the level of the fine shall be fixed in consideration of the general rules of Part 10 of the Penal Code as well as the turnover obtained by the legal person in question during the last year before the pronouncement of sentence or the issue of a ticket fine." http://www.ks.dk/english/competition/legislation/comp-act539-02/ According to the Danish Competition Authority, "the level of a fine shall be fixed in consideration of the general rules of the Penal Code, meaning that the gravity and the duration of the infringement are essential elements." See http://www.ks.dk/english/competition/legislation/guide/ at point 15.

Competition Board ('ECB'), Estonia	No fines for cartel activity;[111] ECB can impose a fine of up to EEK 500,000 for abuse of dominance.[112] Criminal sanctions exist for both, however. No fining guidelines.	No guidance.	No guidance.	No guidance.	EEK 500,000 (abuse of dominance).
Competition Council ('CC'), Lithuania	Similar to pre-1998 Commission practice, CC can impose fines based on gravity and duration, taking account of extenuating and aggravating circumstances and each party's influence in the infringement. No fining guidelines.[113]	No guidance.	No guidance.	No guidance.	10% of gross annual turnover.

[111] Section 73 of the Competition Act (as amended) contains no penalty for companies involved in cartel activity. Personal criminal liability is provided for by section 79, which establishes sanctions of up to 3 years in prison. http://www.legaltext.ee/text/en/X50066K4.htm

[112] Competition Act, section 73[5]: "(1) A member of the management board, of a body substituting for the management board or of the supervisory board of a legal person, who establishes unfair trading conditions, or who limits production, services, goods market, technical development or investments to the prejudice of buyers, or engages in activities involving abuse of the dominant position in the market shall be punished by a fine of up to 300 fine units or by detention. (2) The same act, if committed by a legal person, is punishable by a fine of up to 500,000 kroons." http://www.legaltext.ee/text/en/X50066K4.htm

[113] Law on Competition, sections 41(1): "1. A fine of up to 10 % of the gross annual income in the preceding business year shall be imposed by the Competition Council upon undertakings for prohibited agreements, abuse of a dominant position, …" and 42(1): "In setting the amount of a fine imposed on undertakings, regard shall be had to: 1) the gravity of the infringement; 2) duration of the infringement; 3) circumstances extenuating or aggravating the liability of an undertaking; [repealed] 5) influence of each undertaking in the commission of the infringement, if the infringement has been committed by several undertakings." http://www.konkuren.lt/english/antitrust/legislation_law_new.htm

Nederlandse Mededingingsautoriteit ('NMa'), Netherlands	Similar to current Commission practice, with fines being imposed by the NMa on basis of seriousness and duration of infringement.[114] Detailed fining guidelines exist.[115]	Splits infringements into less serious, serious and very serious offences. Basic amount is set at up to 10% of concerned turnover for less serious breaches. Serious breaches multiplied by 2 (up to 20% of concerned turnover). Very serious breaches multiplied by 3 (up to 30% of concerned turnover).	Fines may increase to 30% of concerned turnover in very serious offences. The NMa guidelines leave open the possibility of additional deterrence above the 10%, 20% and 30% levels in appropriate cases.	Duration taken into account – fine based on total turnover realised by undertaking on the relevant market over the duration of the infringement ('concerned turnover').	10% of total turnover in previous year.
Federal Competition Authority ('FCA'), Austria	Fines imposed by the Cartel Court based on application by the FCA. Size of fine set similarly to pre-1998 Commission practice, based on severity and duration of infringement, enrichment due to the violation and the economic capacity of the undertaking. [116]	No guidance.	Enrichment taken into account. No detailed guidance.	No guidance.	10% of global sales.

[114] Competition Act, sections 57(1): "The fine [for anti-competitive agreements and abuses of dominant positions] shall amount to a maximum of €450,000 or, if this is greater, to 10% of the turnover of the undertaking … in the financial year preceding the decision" and (2) "In determining the level of the fine, the Director-General shall in any event take into account the seriousness and duration of the infringement." http://www.nmanet.nl/en/Images/14_26063.pdf

[115] The Guidelines for the Setting of Fines, Stcrt. 248 of 21 December 2001. http://www.nmanet.nl/nl/Images/11_3860.pdf (Dutch only)

[116] 1988 Cartel Act (as amended), section 142: "the Cartel Court shall impose fines as follows: 1. on enterprises or associations of enterprises, to the amount of €10,000 to €1 million or, in excess of such amount, up to 10% of the global sales achieved in the past business year by each of the enterprises involved in the violation, if they: a. establish a cartel, vertical distributional restraint or concentration that is prohibited …; b. abuse a market-dominating

Irish Competition Authority ('ICA'), Ireland	Imposed by the Court as criminal sanctions following a prosecution brought by the ICA.[117] No fining guidelines.	No guidance.	No guidance.	No guidance.	10% of turnover.
Conseil de la Concurrence ('CC'), Luxembourg	Like the pre-1998 Commission system, the CC can impose fines based on gravity and duration, the situation of the undertaking concerned and the likelihood of repetition. [118]	No guidance.	Likelihood of repetition taken into account; otherwise no guidance.	No guidance.	10% of worldwide turnover.
Autoridade da Concorrencia ('ADC'), Portugal	Similar to pre-1998 Commission system, the ADC imposes fines based on gravity, advantages to the infringer, repeated nature of conduct, extent of participation in the infringement. [119] No fining guidelines exist.	No guidance.	Repeated nature of taken into account; otherwise no guidance.	No guidance.	10% of aggregate turnover.

position…;…d. offend against Article 81 para 1 or Article 82 EC Treaty, provided that the Cartel Court is competent pursuant to Section 42f…" and section 143: "In assessing a fine, due regard shall be given to the severity and duration of the violation, the enrichment achieved by the violation, the degree of fault and the economic capacity. In the case of a cartel established although prohibited pursuant to Section 142 Z 1 lit.a, due regard shall also be given to the contribution in clearing up the violation." http://www.bwb.gv.at/NR/rdonlyres/4E837A92-B3BC-494A-92ED-833A4613FCCA/0/kartellgesetz_englisch.pdf

[117] Irish Competition Act 2002, sections 8(1) and (2) provide for fines of "to a fine not exceeding whichever of the following amounts is the greater, namely, €4,000,000 or 10 per cent of the turnover of the undertaking in the financial year ending in the 12 months prior to the conviction." Criminal sanctions are also established by section 8(1) for cartels. http://www.tca.ie/legislation/competitionact2002.pdf

[118] Competition Law 2004, section 18(2) « Les amendes prévues au paragraphe précédent sont proportionnées à la gravité et à la durée des faits retenus, à l'importance du dommage causé à l'économie, à la situation de l'entreprise sanctionnée ou du groupe auquel l'entreprise appartient et à l'éventuelle réitération de pratiques prohibées par la présente loi. Les amendes sont déterminées individuellement pour chaque entreprise sanctionnée et de façon motivée pour chaque amende. Le montant maximum de l'amende prononcé sur base des paragraphes précédents est de 10 pour cent du montant du chiffre d'affaires mondial hors taxes le plus élevé réalisé au cours d'un des exercices clos depuis l'exercice précédant celui au cours duquel les pratiques ont été mises en œuvre. Si les comptes de l'entreprise concernée ont été consolidés ou combinés en vertu des textes applicables à sa forme sociale, le chiffre d'affaires pris en compte est celui figurant dans les comptes consolidés ou combinés de l'entreprise consolidante ou combinante." http://www.legilux.public.lu/leg/a/archives/2004/0762605/0762605.pdf#page=2

[119] Law of 11 June 2003 Approving the Legal Framework for Competition, Article 43(2): " In the case of associations of undertakings the fine provided for in paragraph 1 shall not exceed 10% of the aggregate annual turnover of the associated undertakings that have engaged in the prohibited behaviour" and Article 44: "The fines referred to in Article 43 are set in relation to the following circumstances, amongst others: a) The gravity of the infringement for the

Servicio de Defensa de la Competencia (SDC), Spain	The Competition Court ("Tribunal de Defensa de la Competencia") has the power to impose fines based on an application by the SDC in a supra-regional area or over the entire Spanish territory. Regional antitrust bodies have the power to impose fines over conduct that restrict or may restrict competition within their respective territories. Factors taken into account include: nature of infringement, size of market affected, market share of the corresponding undertaking, effect on competitors and consumers, duration of infringement and repetition of prohibited conduct.[120] No fining guidelines exist.	No guidelines.	No guidelines. Repetition of the offence is taken into account.	No guidance.	10% of turnover.
Hellenic Competition Commission ('HCC'), Greece[121]	The HCC can impose fines up to 15% of annual gross profits. The applicable principles are unclear. There are no fining guidelines.	No guidance.	No guidelines.	No guidance.	15% of annual gross profits.

maintenance of effective competition in the Portuguese market; b) The advantages that the offending undertakings have enjoyed as a result of the infringement; c) The repeated or occasional nature of the infringement; d) The extent of participation in the infringement; e) Co-operation with the Authority, until the close of the administrative proceedings; f) The offender's behaviour in eliminating the prohibited practices and repairing the damage caused to the competition." http://www.autoridadedaconcorrencia.pt/vImages/descre18ix.pdf

[120] See Section 2, Article 10(2), (a) to (f) of the Spanish Law for Defence of Competition.

[121] The Greek legislation is available at: http://www.epant.gr (Greek only).

Anti-Monopoly Office ('AMO'), Slovakia	Similar to pre-1998 Commission system, the AMO imposes fines for violations of competition law based on the seriousness, repetition (whether an undertaking has been penalised previously) and duration of the infringement. Seriousness is based on the character of the infringement, the actual impact on the market and the size of the relevant market. There are no fining guidelines. [122]	No guidance.	No guidance, although repeat offenders can receive larger fines.	No guidance.	10% of turnover.[123]

[122] Article 38(10) of the Act of 27 February 2001 on Protection of Competition: "When imposing a fine, the Authority shall consider the gravity and duration of the violation of the provisions of this Act, violation of the provisions of special legislation 5b) or violation of a condition, obligation or commitment imposed by a decision of the Authority. When assessing the gravity of the violation, the Authority shall consider its character, actual impact on the market and, where appropriate, the size of the relevant market. In addition to these criteria, the Authority shall also consider other facts with respect to imposing a fine, especially a repeated violation by the same undertaking, an undertaking's refusal to cooperate with the Authority, an undertaking being in the position of a leader or instigator of a violation, gaining financial benefit as a result of a violation or failure to fulfill in practice an agreement restricting competition." http://www.antimon.gov.sk/dl.aspx?f=%2ffiles%2f5%2f2004%2fZakon+c.+136-2001-+rekon.+znenie+-+po+anglicky.rtf

[123] Id., Article 38(5).